STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2014
V	No. 314193 Midland Circuit Court
DUC VAN NGUYEN, Defendant-Appellant.	LC No. 12-005140-FH

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, assault with a dangerous weapon, MCL 750.82, and third-offense domestic violence, MCL 750.81(4). We affirm.

I. RIGHT TO COMPULSORY PROCESS

Defendant first argues that he was denied his Sixth Amendment right to compulsory process when the prosecution failed to produce the victim in this case, Kim Phouc Dang Le,[1] at trial. While the topic of producing Le for trial came up at the circuit court, it was in the context of the prosecution's statutory duty to produce a previously endorsed witness. The prosecution explained that Le, who had moved to California, stated that he was unwilling to return to testify at trial even though he acknowledged being served with a subpoena. While defendant argued that Le did not meet the definition of "unavailable" under MRE 804(a), which would have made Le's preliminary examination testimony inadmissible at trial, he never raised the instant constitutional issue before the trial court. Therefore, the issue is not preserved for appellate review. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997); see also *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."). We review unpreserved, constitutional issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

[1] The prosecution and the trial court referred to him as "Kim Phuoc Le Dang," but Le explained at the preliminary examination that his last name is "Le."

The Sixth and Fourteenth Amendments of the United States Constitution guarantee criminal defendants the right "to have compulsory process for obtaining witnesses" in their defense. US Const, Ams VI & XIV; *People v Kowalski*, 492 Mich 106, 139; 821 NW2d 14 (2012). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . ." *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).

But a criminal defendant's right to compulsory process is not absolute. In order to invoke the right, a defendant must show that the witness's testimony sought is "both material *and favorable to the defense*." *People v McFall*, 224 Mich App 403, 408-409; 569 NW2d 828 (1997) (emphasis added), citing *United States v Valenzuela-Bernal*, 458 US 858, 873; 102 S Ct 3440; 73 L Ed 2d 1193 (1982). Here, defendant failed to establish the favorability prong of this requirement. When the topic of producing Le was discussed at the trial court, defendant never even attempted to characterize Le as being a favorable witness. This was understandable because when Le testified previously at the preliminary examination, he described how defendant threw a fan at him, hit him with a beer bottle in the head, and later stabbed him several times with a knife. Le explained that defendant stabbed him in the back, in the arm, and on his head, which resulted in him needing 23 stitches and some staples at the hospital. Accordingly, because defendant never made a showing that Le's testimony at trial was going to be favorable to him, he cannot establish any plain error with respect to his claim of being deprived his constitutional right to compulsory process, and his claim fails.

On appeal, defendant refers to two letters that Le wrote to the trial court, asking for the charges against defendant to be dropped. However, even if defendant had made this argument at the trial court, these letters do not suggest that Le would have been a favorable witness for defendant. In Le's first letter to the trial court, Le asked the court to drop the charges against defendant, while calling himself "the victim in the case" and stating that defendant "attacked me and I was injured. . . . I understood he crossed the line and what he did to me was illegal . . . ." In Le's second letter to the trial court, Le again asked for the charges against defendant to be dropped, while still describing himself as a "victim." These letters do not demonstrate that Le would have been a favorable witness to defendant. All they demonstrate is that Le was a reluctant witness who, for personal reasons, did not want defendant to be criminally prosecuted or punished. But the letters did not disavow what Le previously described as happening that night. In fact, the first letter, where he states that he was "illegal[ly]" "attacked," clearly buttresses his preliminary examination testimony. Consequently, defendant's reliance on the letters on appeal is misplaced.

Also, while arguing in his brief on appeal that his constitutional rights were violated, defendant relies on cases, such as *People v Eccles*, 260 Mich App 379; 677 NW2d 76 (2004), but these types of cases do not address a defendant's constitutional rights. Instead, *Eccles* describes the prosecution's *statutory* duties that are required under MCL 767.40a, which involves the filing of witness lists. According to *Eccles*,

> [a] prosecutor who endorses a witness under MCL 767.40a(3) is obligated to exercise due diligence to produce that witness at trial. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. If the trial court finds a lack of due

> diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. [*Id.* at 388 (citations omitted).]

Thus, these cases simply are inapplicable because whether the prosecution violated any statutory obligation is a separate issue from whether defendant was denied a constitutional right. Regardless, the statute, MCL 767.40a(4), also allows for the prosecution to remove a witness by leave of the trial court for good cause shown, which is what the prosecution attempted to do. And because the only issue defendant raises on appeal is the constitutional one, we need not consider whether the trial court clearly erred in finding that good cause existed under MCL 767.40a(4). See MCR 7.212(C)(5); *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008) (requiring an appellant to raise issues in his statement of the questions presented).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant, in his Standard 4 Brief, argues that he was denied the effective assistance of counsel when his counsel failed to request an interpreter for use at trial. In order to preserve a claim of ineffective assistance of counsel for appellate review, a defendant must move either for a new trial or for an evidentiary hearing. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant preserved the issue by asking the trial court after the trial concluded for a new trial on the basis of his counsel failing to request an interpreter.

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *Id.*

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

After defendant was convicted, he wrote a letter to the trial court, complaining that his trial counsel did not request an interpreter as defendant previously had suggested. The trial court then held an evidentiary hearing on the matter. At the hearing, defendant first claimed that an interpreter was necessary because he could not understand everything that was being said at trial. But when pressed on that contention, he then asserted that an interpreter was necessary to help convey his testimony to the jury. Without any evidentiary support, such as an affidavit from any juror, defendant claimed that the jury did not understand him. But the trial judge noted that he, himself, did not have any trouble understanding anything that defendant was saying, either at trial or at the hearing. And when defendant was asked at the hearing if he understood all of the

questions that were asked of him on cross-examination at trial, he admitted that he did. Defendant also averred that he did not understand what one of the witnesses was saying at trial, but in his next breath, he claimed that the witness was not telling the truth. As the prosecution noted at the hearing, defendant's assertion that the witness was lying was evidence that he actually understood what she was saying. In short, the trial court, the prosecutor, and defense counsel all stated at the hearing that they all could understand what defendant was saying, and defendant appropriately responded to every inquiry that the trial court made of him. Defense counsel specified that during all of his dealings with defendant, which included prior criminal proceedings as well, there had never been any instance where the two of them had any difficulty communicating. Furthermore, in defendant's prior criminal trial, defense counsel stated that no interpreter was used in that trial for defendant's benefit.

In light of the above facts, the trial court did not clearly err in finding that defendant sufficiently understood the English language. And because an interpreter is only necessary, in this context, when a defendant lacks the "ability to understand or speak the English language," MCL 775.19a, defense counsel's performance did not fall below an objective level of reasonableness when he did not request an interpreter. Moreover, even if defense counsel's performance could somehow be considered deficient, defendant has failed to establish any prejudice because (1) as evidenced by the trial court's posttrial ruling, it would have denied an earlier request by defendant and (2) even assuming the request would have been granted before trial, there was no evidence that the jury would have come to a different conclusion.

III. SUFFICIENCY OF COMPLAINT

Defendant next argues in his Standard 4 Brief that the district court and circuit lacked jurisdiction because the criminal complaint was inadequate to initiate the proceedings.[2] Defendant specifically argues that the lower courts lacked jurisdiction because the complaint did not provide any indication that the affiant was making his claims with personal knowledge regarding the alleged acts and it did not indicate any other source for the complainant's belief. Consequently, defendant asserts that these omissions rendered it impossible for the magistrate to evaluate whether probable cause existed to issue the arrest warrant. This unpreserved claim is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

"The primary function of a complaint is to move the magistrate to determine whether a warrant shall issue." *People v Higuera*, 244 Mich App 429, 443; 625 NW2d 444 (2001) (quotation marks omitted). MCR 6.101 specifies the requirements for a complaint and provides as follows:

[2] We note that defendant referenced the sufficiency of both the complaint and the felony information in his statement of the questions presented. However, for his discussion of the issue, he only addressed the sufficiency of the complaint. Thus, defendant has abandoned the issue with respect to the information by failing to address it in his appellate brief. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009); *People v Coy*, 258 Mich App 1, 19-20; 669 NW2d 831 (2003).

> (A) A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense.
>
> (B) The complaint must be signed and sworn to before a judicial officer or court clerk.

Additionally, in order to for a valid arrest warrant to be issued, a complaint must contain information that would enable a magistrate to determine that probable cause exists. Because the magistrate "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause[, the magistrate] should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime." *Giordenello v United States*, 357 US 480, 486; 78 S Ct 1245; 2 L Ed 2d 1503 (1958); see also *Whiteley v Warden, Wyoming State Penitentiary*, 401 US 560, 564; 91 S Ct 1031; 28 L Ed 2d 306 (1971) (stating that before an arrest warrant can be issued, a judicial officer must "be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant"). In other words, a complaint must provide some basis for a magistrate to determine that probable cause exists, such as the complainant stating that he has personal knowledge of the alleged events or the complainant stating that he is relying on other sources for the allegations, *Giordenello*, 357 US at 486, and conclusory allegations are insufficient for this purpose, *Whiteley*, 401 US at 565.

Here, while the complaint lacked any statements regarding the basis for the complainant's allegations, we note that it did meet the requirements of MCR 6.101. For all three counts, the complaint specifically provided who defendant allegedly assaulted, in addition to the statutory citations.

Furthermore, this Court in *People v Mayberry*, 52 Mich App 450; 217 NW2d 420 (1974), addressed this particular issue. The *Mayberry* Court held that a conclusory complaint that fails to identify sources of information in violation of state and Federal constitutional rights "does not oust jurisdiction." *Id.* at 450-451. The Court relied on our Supreme Court's decision in *People v Burrill*, 391 Mich 124, 132; 214 NW2d 823 (1974), which concluded that while a defective and conclusory complaint will invalidate the resulting arrest warrant, such an inadequate complaint "[does] not vitiate the efficacy of the complaint as the document initiating judicial proceedings or affect the jurisdiction of the court." See also *Frisbie v Collins*, 342 US 519, 522; 72 S Ct 509; 96 L Ed 541 (1952) ("[T]he power of a court to try a person for crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a 'forcible abduction.'")

Therefore, even if the complaint in the instant case was inadequate because it failed to provide the magistrate with a basis for ascertaining whether there was probable cause that defendant committed the alleged crimes, any deficiency does not deprive the courts of

jurisdiction. Accordingly, defendant's claim that the court lacked jurisdiction fails.

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood